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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 311

S. J. GROVES & SONS COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 57–63) is reported in 64 F. Supp. 472.

JURISDICTION

The judgment of the Court of Claims was entered on March 4, 1946 (R. 63). A motion for new trial, filed by petitioner, was overruled on June 3, 1946 (R. 63). The petition for a writ of certiorari was filed on July 18, 1946 (R. 63). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended, 28 U. S. C. 288 (b).

QUESTION PRESENTED

Whether a "tentative construction program * * * shown on the drawings" relating to a standard form Government contract, stated by both the drawings and the specifications to be "tentative only" and "included in the drawings solely to assist bidders and the contractor in preparing their own construction programs," and with reference to which the specifications further stated that "The Government assumes no responsibility for any use that bidders or the contractor may make thereof [the tentative construction program] or for any deductions or conclusions that may be made from the program," constituted a warranty by the Government that performance of the contract could be completed within the time indicated by the tentative program.

CONTRACT PROVISIONS INVOLVED

The pertinent provisions of the contract and specifications involved are set out in the Appendix, pp. 16–20.

STATEMENT

On October 5, 1936, petitioner, a Minnesota corporation having its principal office and place of business in Minneapolis, Minnesota, entered into a contract with the United States to furnish materials for and construct the Grassy Lake Dam, Upper Snake River Project, Idaho, at the contract price of $488,477.50 (R. 29). Construction, which was to be in accordance with the specifications, schedules, and drawings made a part of the contract, was to commence within 30 days after receipt of notice to proceed and be completed within 450 calendar days thereafter (R. 29–30, 51). The work was to be performed in rugged mountain country, 7,200 feet above

sea level, at a point where there is heavy snowfall from October to April each year (R. 50).

There was included in the drawings and referred to in the specifications a "tentative construction program" predicated on the assumption that notice to proceed would be received by petitioner on September 1, 1936, a date prior to that on which the contract was entered into, namely, October 5, 1936 (R. 29–30, 51). The specifications stated that the "tentative construction program", if followed, would result in the completion of work within the 450 calendar days specified for completion. The specifications further stated, however:

> The construction program shown on the drawings is tentative only, and the Government assumes no responsibility for any use that bidders or the contractor may make thereof or for any deductions or conclusions that may be made from the program. The tentative construction program is included in the drawings solely to assist bidders and the contractor in preparing their own construction programs. None of the statements in this paragraph nor anything on the tentative construction program shall relieve the contractor from the obligation to commence, prosecute, and complete the work [within 450 calendar days] (R. 51–52).

The drawings also referred to the construction program as "tentative" and repeated that it was "included in the drawings solely to assist bidders and the contractor in preparing a construction program for their use" (R. 52). The "tentative construction

program" indicated that work on certain parts of the project could be started in August and September 1936, that other work could be started on April 1, 1937, and that the entire project could be completed on or before December 1937 (R. 52).

Under a separate contract with the Government petitioner performed some work at the dam site in the Fall of 1936 but, because of the short working season at the dam site, petitioner requested the Government's construction engineer to defer notice to proceed under the contract here involved until the weather became favorable the following spring (R. 30, 54). This was done and, accordingly, notice to proceed was not received by petitioner until June 14, 1937, thereby fixing September 7, 1938, as the date for completion (R. 30, 54).

On April 12, 1937, petitioner submitted to the Government its own anticipated construction program, with the exception of certain items (R. 53). Petitioner's schedule fixed approximately June 10, 1937, as the beginning date for a considerable number of contract items, with October 31, 1937, as the completion date for that season (R. 53). Petitioner's 1937 schedule also indicated that in 1938 it intended to begin operations on or about May 15 and to complete the entire project on or before July 14, 1938 (R. 53). Petitioner's 1937 schedule stated that it was "contingent on weather, temperature and ground conditions" (R. 53). On March 10, 1938, petitioner submitted to the Government its anticipated construction program for that year, indicating that it

contemplated beginning work in June 1938 and that the season would end early in October 1938 (R. 54). Petitioner's 1938 schedule stated that it was "tentative and dependent on weather, temperature, ground and foundation conditions, and is subject to changes and alterations by and for the government and any and all provisions of the general contract pertaining or resulting directly or indirectly" (R. 53). The schedules thus submitted by petitioner were based upon its experience on other projects at or near the Grassy Lake Dam and also upon its investigation and inquiry made of ranchers and others residing or working in the vicinity of the Grassy Lake area (R. 30, 52–53).

The Government issued a stop order on October 6, 1938, deferring prosecution of further work during that winter season (R. 30, 56). The contractor was directed to resume work on June 29, 1939, when weather conditions were again favorable, and a time extension of 266 days was allowed petitioner for this suspension of work (R. 30–31, 56). Three change orders for extra work were also issued and a total of 145 days was added to the contract time for the performance of such work (R. 30–31, 56). Petitioner completed construction, within the contract time as thus extended, on October 14, 1939 (R. 31, 42).

Thereafter, petitioner asserted a claim for $70,000 for additional expenses which it claimed to have incurred during one year's delay allegedly caused by the Government in misrepresenting the length of the working season at the dam site (R. 43). This claim,

which was rejected by the contracting officer (R. 46) and, in turn, by the head of the department (R. 47), forms in part the basis of this suit, brought by petitioner in the Court of Claims on June 30, 1943 (R. 1).[1] The court below held that petitioner was "plainly precluded from asserting" that by the "tentative construction program" included in the draw-

[1] In its amended petition in the Court of Claims, petitioner referred to the claim here involved, for $70,000, as its "second cause of action" (R. 6–9). In petitioner's "first cause of action" it sought judgment for $23,615.70 (R. 6) for excess costs incurred by it due to its having encountered unknown sub-surface conditions in connection with the excavation of certain "borrow pits" (R. 1–6). Petitioner's claim in this amount had been approved by the head of the department but payment had been refused by the Comptroller General (R. 47–50) and the court below awarded judgment to petitioner in that amount (R. 57, 63). There is no question raised in this proceeding with respect to the "first cause of action."

Petitioner's "second cause of action," which is the one here involved, appears to have been based by petitioner, in its amended petition in the Court of Claims, not only on the asserted misrepresentation by the Government with respect to the length of the working season but also on certain delays petitioner claimed to have encountered in connection with the unknown subsurface conditions referred to in the "first cause of action" (R. 8–9). The court below, however, treated the "second cause of action" as relating entirely to the alleged misrepresentations arising from the Government's "tentative construction program." See pp. 3–4, *supra*. Since the petition for a writ of certiorari deals with the "second cause of action" in the same way, it appears that the other basis for the second cause of action, namely, the delays which allegedly resulted from petitioner's having encountered unknown sub-surface conditions, has been abandoned by petitioner.

ings and referred to in the specifications the Government "warranted that work could be performed in the time shown therein" (R. 62), and denied recovery to petitioner. The court found that certain of the delays encountered by petitioner were attributable to petitioner itself and to its own subcontractors (R. 55–56); that "The proof in the case fails to show that the delays experienced by [petitioner], as described in the second cause of action, were attributable" to the Government (R. 57); that performance of extra work under the three change orders which were issued "extended the time for completing all of the contract work one extra working season beyond the time required to complete the original contract work" (R. 56); and that "The proof fails to show that it would have been possible for the [petitioner] to perform all of the contract work in two working seasons instead of the three working seasons that were required to do the work" (R. 56). The court found further that "The record is unsatisfactory to establish any definite amount as rental value for the equipment described for the period of time [petitioner] contends that it was idle" (R. 56–57).

ARGUMENT

The question presented is a narrow one. Briefly, it is whether the "tentative construction program", referred to in the specifications of the instant standard form of Government construction contract as a tentative program only and one for which "the Government assumes no responsibility for any use

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that bidders or the contractor may make thereof" (R. 51; *infra*, p. 20), is what it purports to be or, or whether it constitutes a warranty by the Government that a contractor, by complying with the schedule, will find it possible to complete the project within the time indicated therein. In determining that the specifications and drawings, in describing the "tentative construction program", meant just what they said, the court below was clearly correct.[2]

1. There is nothing in the language of either the contract, the specifications, or the drawings with respect to the "tentative construction program" that could reasonably be interpreted to constitute an enforceable promise by the Government that compliance with the program was possible. Indeed, all the language points the other way. Paragraph 21 of the specifications (R. 51; *infra*, p. 19) bound petitioner to complete the work within 450 calendar days from the date of receipt of the notice to proceed. That was the controlling provision of the contract with respect

[2] Clearly, if the "tentative construction program" did not constitute such a warranty as is claimed by petitioner, there was no liability on the part of the Government with respect to the delays encountered by petitioner, particularly in view of the finding of fact of the court below that the proof failed to show that such delays were attributable to the Government (R. 57). *Crook Co.* v. *United States*, 270 U. S. 4; *United States* v. *Rice*, 317 U. S. 61; cf. *The Howard P. Foley Co., Inc.* v. *United States*, 63 F. Supp. 209 (C. Cls.), pending on writ of certiorari, No. 50, October Term, 1946.

to completion of the work.[3] Paragraph 23 of the specifications (R. 51–52; *infra*, pp. 19–20) required "The capacity of the contractor's construction plant, sequence of operations, and methods of operation [to] be such as to insure the completion of the work within the period of time specified" in Paragraph 21. The "tentative construction program" was referred to in Paragraph 23 as a program which, if followed, would "result in the completion of the work within the period of time specified in paragraph 21." Paragraph 23, however, described the program as "tentative" not once but four times. It specifically stated that "the Government assumes no responsibility for any use that bidders or the contractor may make thereof or for any deductions or conclusions that may be made from the program." It specifically stated that the "tentative construction program" was "included in the drawings solely to assist bidders and the contractor in preparing their own construction programs", which they were required to do under subsequent provisions in the specifications, and that "None of the statements in this paragraph nor anything on the tentative construction program shall relieve the contractor from the obligation to commence, prosecute, and complete the work as provided

[3] As is usual in standard form Government contracts, the contract contained provisions for extension of the time for performance by the Government in the event change orders should be issued, changed conditions should be encountered, or that "delays in the completion of the work" should occur as a result of "unforeseeable causes beyond the control and without the fault or negligence of the contractor" (R. 10–11, 14–15; *infra*, pp. 16–19).

in paragraph 21." And Drawing No. 11, which contained the "tentative construction program" itself, stated that it was tentative and repeated that it was "included in the drawings solely to assist bidders and the contractor in preparing a construction program for their use" (R. 52). In view of this language there clearly was no intention on the part of the Government to promise that completion of the contract was possible within the period shown in the "tentative construction program".[4]

Nor is there any showing that petitioner in fact regarded the "tentative construction program" as anything more than it purported to be. Aside from the language of the specifications and drawings themselves with respect to the "tentative construction program," which we believe were not susceptible of misunderstanding by a contractor who was "neither unsophisticated nor careless" (see *Wells Bros. Co.* v. *United States*, 254 U. S. 83, 87), the record is clear that petitioner based its construction schedule upon its own "experience at or near Grassy Lake Dam, and also upon its investigation and inquiry made of ranchers and others residing or working in the vicinity of the Grassy Lake area" (R. 53, 30, 52) and, in view of petitioner's information thus obtained, regarded even its own schedule as "tentative" and

[4] The nature of the language used in the specifications and the drawings to describe the "tentative construction program" renders inapposite the cases cited by petitioner (Pet. 24–25, 33) as in conflict with the decision below. Cf. *MacArthur Bros. Co.* v. *United States*, 258 U. S. 6.

"contingent on weather, temperature and ground conditions" (R. 53). In addition, it should be noted that it was at petitioner's own request that the "tentative construction program" provided by the Government was varied, at least to the extent of postponing the commencement of operations (R. 30, 54).

Moreover, even assuming that the "tentative construction program" constituted a promise by the Government that completion of performance as shown by the program was possible, petitioner has failed to show that it was in fact prejudiced or damaged in any way by its inability to observe the "tentative construction program." Petitioner's complaint is that it was damaged because the construction work required three working seasons rather than two as contemplated in the "tentative construction program" (Pet. 2; R. 8). But this complaint overlooks the time that was necessary to perform the extra work required under three change orders issued pursuant to the contract (R. 10–11, 30–31, 56; *infra*, pp. 16–17). These change orders gave petitioner 145 days additional time to perform the extra work and, as the court below found:

> Performance of extra work under these three change orders extended the time for completing all of the contract work one extra working season beyond the time required to complete the original contract work.
>
> The proof fails to show that it would have been possible for the plaintiff to perform all of the contract work in two working seasons

> instead of the three working seasons that were required to do the work (R. 56).

Any increased costs incurred by petitioner as a result of the extra working season it was required to work [5] would therefore seem to be chargeable to the change orders and presumably were recognized in contract price adjustments.

2. Petitioner asserts that it has "been unable to get before this Court the record facts" (Pet. 4), apparently because the "findings of fact by the court below * * * are very unsatisfactory from the standpoint of the petitioner" (Pet. 3). Petitioner urges, therefore, that this Court remand the case to the court below for the purpose of making appropriate findings of fact (Pet. 4, 22–23, 42).

It will be observed that petitioner in bringing the record of the case from the Court of Claims to this Court, did not have included therein, as authorized by Section 3 (b) of the Act of February 13, 1925, 43 Stat. 939, as amended, 28 U. S. C. 288 (b),[6] in addition to the findings of fact, "such other parts of the record as are

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[5] It should be noted that the court below specifically found that petitioner failed to prove that it had incurred the increased costs which it claims resulted from its having been required to work a third working season (R. 56–57).

[6] Section 3 (b) of the Act of February 13, 1925, 43 Stat. 939, as amended, 28 U. S. C. 288 (b), provides:

"(b) In any case in the Court of Claims * * * it shall be competent for the Supreme Court upon the petition of either party, whether Government or claimant, to require, by certiorari, that the cause be certified to it for review and determination of all errors assigned, with the same power and authority, and with like effect, as if the cause had been

material to the errors assigned." If petitioner believed that the findings of the court below were contrary to the evidence, or that there was "a failure to make any finding of fact on a material issue," it should have included in the record the evidence on which it relied. See also Rule 99 (b), Rules of the Court of Claims, 91 C. Cls. xxviii,[7] and Rule 41, par. 1, Rules of this Court. Having failed to have included in the record the evidence on which it relies, petitioner may not, on the basis of that

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brought there by appeal. In such event, the Court of Claims shall include in the papers certified by it the findings of fact, the conclusions of law, and the judgment of decree, as well as such other parts of the record as are material to the errors assigned, to be settled by the Court.

"The Court of Claims shall promulgate rules to govern the preparation of such record in accordance with the provisions of this section.

"In such cases the Supreme Court shall have authority to review, in addition to other questions of law, errors assigned to the effect that there is a lack of substantial evidence to sustain a finding of fact; that an ultimate finding or findings are not sustained by the findings of evidentiary or primary facts; or that there is a failure to make any finding of fact on a material issue."

[7] Rule 99 (b) of the Rules of the Court of Claims provides, in part:

"Whenever a certified transcript of the record is requested by the plaintiff or his attorney of record, or by the Assistant Attorney General, for the purpose of filing a petition for a writ of certiorari in the Supreme Court, and the plaintiff or defendant desires not only the pleadings, findings of fact, conclusion of law, judgment and opinion of the Court but also "other parts of the record as are material to the errors assigned," the party making the request for the record shall file with the Court, not more than forty-five (45) days after judgment has been entered, a copy of the petition for

evidence, attack the findings of fact made by the court below.[8]

CONCLUSION

The decision of the court below is clearly correct. There are no conflicts of decision, and the case does not call for review. The petition for a writ of certiorari should, therefore, be denied.

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the writ of certiorari and an original and five (5) copies of such parts of the record as, in his judgment, are material to the errors assigned, and serve upon the opposing counsel a copy of the same at the same time it is filed in the Court.

"Unless the parties can agree as to the parts of the evidence in the record which are material to the errors assigned, then counsel for the party so objecting shall, within ten (10) days from the date of the filing in the Court and service upon him of the above record, file with the Clerk of the Court an original and five (5) copies of such parts of the evidence as he considers should become part of the record to be certified, and at the same time serve upon the appellant's attorney a copy thereof. The Court will then settle the record to be certified. * * *"

[8] If the court below, upon finding that the Government was not responsible for the extra working season petitioner was required to work on the project, had failed to make further findings with respect to the amount of damages, if any, proved by petitioner, then the cases cited by petitioner (Pet. 23, 42), in support of its argument that this case should be remanded to the court below for the purpose of making findings with respect to the amount of such damages, might be pertinent. As it is, however, there is no occasion for such a remand, since the court below, in addition to finding no liability, specifically found no damage (R. 56–57). Thus, the only failure has been that of petitioner to bring before this Court the evidence upon the basis of which it attacks those findings. The cases cited by petitioner in support of its remand argument are, therefore, not in point.

Respectfully submitted.

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SEPTEMBER 1946.

APPENDIX

I. CONTRACT

ARTICLE 1. * * *

The work shall be commenced and shall be completed as provided in paragraph 21 of the specifications.

* * * * *

ART. 3. *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than $500 shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered: *Provided, however,* That the contracting officer, if he determines that the facts justify such action, may receive and consider, and with the approval of the head of the department of his duly authorized representative, adjust any such claim asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made, the dispute shall be determined as provided in article

15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

ART. 4. *Changed conditions.*—Should the contractor encounter, or the Government discover, during the progress of the work, subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they do so materially differ the contract shall, with the written approval of the head of the department or his duly authorized representative, be modified to provide for any increase or decrease of cost and (or) difference in time resulting from such conditions.

* * * * *

ART. 9. *Delays.—Damages.*—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, and the contractor and his sureties shall be liable to the Govern-

ment for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof: *Provided*, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes, if the contractor shall within 10 days from the beginning of any such delay (unless the contracting officer, with the approval of the head of the department or his duly authorized representative, shall grant a further period of time prior to the date of final settlement of the contract), notify the contracting officer in writing of the causes of delay,

who shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject only to appeal, within 30 days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay and the extension of time for completing the work shall be final and conclusive on the parties hereto.

II. Specifications

3. *Climatic conditions.*—The contracting officer may order the contractor to suspend any work that may be subject to damage by climatic conditions.

* * * * *

21. *Commencement, prosecution and completion of work.*—The contractor shall begin work within thirty (30) calendar days after date of receipt of notice to proceed, and shall complete all of the work within four hundred and fifty (450) calendar days from the date of receipt of such notice. The contractor shall at all times during the continuance of the contract prosecute the work with such forces and equipment as in the judgment of the contracting officer are sufficient to complete it within the specified period of time.

* * * * *

23. *Construction program.*—The contractor's construction operations shall be at all times subject to the approval of the contracting officer. The capacity of the contractor's construction plant, sequence of operations, and methods of operation shall be such as to insure the completion of the work within the period

of time specified. A tentative construction program has been prepared by the Government and is shown on the drawings, which program, if followed, will result in the completion of the work within the period of time specified in paragraph 21. The construction program is based on an assumption that notice to proceed will be received by the contractor on September 1, 1936. The construction program shown on the drawings is tentative only, and the Government assumes no responsibility for any use that bidders or the contractor may make thereof or for any deductions or conclusions that may be made from the program. The tentative construction program is included in the drawings solely to assist bidders and the contractor in preparing their own construction programs. None of the statements in this paragraph nor anything on the tentative construction program shall relieve the contractor from the obligation to commence, prosecute, and complete the work as provided in paragraph 21. Within sixty (60) calendar days after receipt of notice to proceed, the contractor shall furnish the contracting officer a complete construction program showing in detail his proposed program of operations. Revised construction programs shall be submitted by the contractor at intervals of not more than six months, and in addition thereto the contractor shall immediately advise the contracting officer of any proposed changes in his construction program.

U. S. GOVERNMENT PRINTING OFFICE: 1940